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November 3, 1999

Michelle Brown, Commissioner
Alaska Department of Environmental Conservation
555 Cordova Street
Anchorage, Alaska 99501-2617

Thomas Chapple
Director of Air & Water Quality
Alaska Department of Environmental Conservation
555 Cordova Street
Anchorage, Alaska 99501-2617

Re: Alaska's Role in Preventing Significant Deterioration

Dear Commissioner Brown and Mr. Chapple:

On behalf of Cominco Alaska's General Manager, John Key, and its Senior Environmental Manager, Charlotte MacCay, I wanted to thank you for speaking on behalf of the centrally important role that the state of Alaska necessarily must have in the Prevention of Significant Deterioration of air quality in Alaska at the recent conference with EPA on Cominco's PRI permit. At that conference, I noted the aspects of the PSD program that make the role of state and local government of primary importance, as well as EPA's historic recognition in adopting the PSD regulations that state and local primacy was vital and central to the very meaning of how much deterioration is "significant." The authorities I quoted at that conference are historic and not easily accessible. I include them below for your reference in case further discussions on the subject make them relevant.

In promulgating the PSD regulations initially EPA made clear that the amount of deterioration that would be considered "significant" was a subjective judgment that should and would vary with locality and should be based on state and local preferences and weighing of social, economic and environmental factors. According to EPA:

As was pointed out in the initial proposed
rulemaking, **determination of that level of**

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deterioration which constitutes "significant" deterioration is basically a subjective decision, because the primary and secondary National Ambient Air Quality Standards are required to be protective of all known adverse effects on public health and welfare in a nationwide context. Response to the initial proposed rulemaking confirmed that consideration of varying social, economic, and environmental factors in different areas would result in varying definitions of what constitutes significant deterioration. None of the information received during the public comments period would enable the Administrator to justify any but a subjective method for defining when increases in the concentration of pollutants become "significant." Strong sentiment was expressed at public hearings, in written comments, and during consultations that States and localities should be given the maximum degree of flexibility in making judgments as to when increases in concentrations become "significant," because the judgments must be based on considerations which vary from locality to locality.

39 Fed. Reg. 31001 (August 27, 1974).

EPA further emphasized that in its PSD regulations "the primary opportunity for making these decisions is reserved for the states and local governments," noting that "[i]n the Administrator's judgment, this matter normally should not be handled at the Federal level, but should become a matter for discussion and decision making at a governmental level in close contact with the area." *Id.*

The reasons why PSD determinations were most appropriately to be made by those closest to those decisions and affected by them was spelled out by EPA in proposing the PSD regulations and their "increment" approach:

The relative significance of air quality versus economic growth may be variable dependent upon regional conditions. For example, relatively minor

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deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air." Conversely, in areas with severe unemployment and little recreational value, the same level of deterioration might very well be considered "insignificant" in comparison to the favorable impact of new industrial growth with resultant employment and other economic opportunities. Accordingly, the definition of what constitutes significant deterioration must be accomplished in a manner to minimize the imposition of inequitable regulations on different segments of the Nation.

38 Fed.Reg.18986, 18988 (July 16, 1973).

Indeed, EPA stated that the making of PSD decisions by states and localities was one of its major reasons for the "increment" approach:

This approach has the major advantage that the governmental units and citizens most affected by decisions on maintenance of air quality would make those decisions, based upon conditions existing at that time, thereby ensuring that local requirements and preferences with regard to matters such as land use, economic development, and use of natural resources are taken into consideration. Thus, economic growth would not be arbitrarily restricted to conform to national views on nationwide deterioration, but, rather, would be subjected to State and local decisions as to the form, direction, extent, and distribution of such growth and as to the conditions to be imposed on the construction or modification of facilities which could have a significant impact on air quality.

Id. at 18992 (1973)

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The Court of Appeals for the District of Columbia, in the leading case of *Alabama Power Co. v. Costle*, ruled that EPA "is without authority to dictate to the States their policy for management of the consumption of allowable increments. *Alabama Power Co. v. Costle*, 636 F.2d 323, 361 (1979). It added that "[I]n the allocation of responsibilities made by Congress, maximum limitations have been set. These must be observed by the states, but assuming such compliance, growth-management decisions were left by Congress for resolution by the states. *Id.* at 364.

We have previously emphasized that BACT is by its very definition, a "case-by-case" determination of state and local environmental, economic and energy factors to be made by "the permitting authority," in this case Alaska.

We hope that this history and background will be useful to ADEC and to EPA in deciding the appropriate roles for EPA and the State of Alaska in making PSD decisions on Cominco's PSD/PRI permit, decisions we hope will not be further delayed.

Very truly yours,


Robert T. Connery
of Holland & Hart LLP

RTC

cc: Charles E. Findley
Julie Mathews, Esq.
John Key
Charlotte MacCay
Jim Kulas